IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

APPEAL NO.633 OF 2002

IN

COMPANY PETITION NO.1201 OF 2001

...

Mr.Shashi K. Gopal ...Appellant
(orig.Petitioner)

v/s.

M/s.Atco Healthcare Ltd. ...Respondent
(orig.Respondent)

...

Mr.S.C.Gupta i/b Warekar & Warekar for the Appellant.

None for the Respondent.

...

CORAM: D.K.DESHMUKH &
J.H.BHATIA, JJ.

DATED: 23RD OCTOBER, 2007

P.C.:

1. This Appeal is filed by the original Petitioner, who had filed a company petition seeking an order for winding up of the Respondent-company on the ground that it is unable to pay its debts. The learned single Judge by order dated 9-1-2002 declined to accept the petition and dismissed the same.

2. Perusal of the petition shows that the Appellant is the ex-employee of the Respondent-company. He was appointed as a senior Dy.General Manager in the company with effect from 3rd July, 2000. According to the Petitioner, in term of his appointment order the Petitioner apart from his remuneration was entitled to other facilities, which included actual reimbursements of telephone bills, mobile phone expenses, expenses related to own/hired vehicle, car fuel and drivers salary etc. Those facilities were enumerated in the letter dated 3rd July, 2000. According to the Appellant, he joined the services on 3rd July, 2000 and was working till 4th November, 2000. Thus, the Appellant was in the service of the

company for about four months. By letter dated 13-11-2000 addressed to the Respondent-company, the Appellant asked for reimbursement of Rs.20562/- for August,2000, Rs.20178.22 for September,2000 and Rs.21321.31 for October, 2000. He also asked for salary of Rs.28620/- for the month of October, 2000. Thus, the total amount demanded was Rs.90,681.53. In this letter though he claimed that he has taken money on credit card and spent on company's business purpose and is paying high rate of interest, he did not claim interest on the amount. It appears that, according to the Appellant, the amounts were not paid, therefore a statutory notice was issued on 28-2-2001. By that statutory notice the Appellant claimed Rs.36,000/- towards reimbursement of expenses related to the vehicle for three months i.e. August, September & October, 2000, at the highest limit of entitlement i.e. Rs.12,000/-. He also claimed Rs.6322.50 for three months towards driver's salary. He claimed Rs.14082/- towards fuel expenses. He claimed Rs.981/- towards expenses incurred on pursuit of profession. He claimed Rs.1206/- towards reimbursement of telephone expenses and Rs.3471/- towards mobile expenses. By this notice, he also claimed an amount of Rs.28620/- towards salary of

October, 2000. He also claimed an amount of Rs.27898.24 as interest. Thus, a total amount of Rs.1,18,580/- was claimed. He also called upon the company to pay interest at the rate of 14% p.a. on the amount of Rs.90682.53 from the date of notice till the date of realisation. The statutory notice was replied to by the company. The reply is dated 3rd April, 2001. It was stated that the Appellant has not submitted the daily activity reports after 16-9-2000 and in the absence of daily activity reports, Conveyance bills cannot be cleared. It was claimed that so far as other claims made are concerned, certain forms have not been submitted by the Appellant. So far as claim for interest is concerned, it was claimed that there was no contract for payment of interest and therefore the Appellant is not entitled to claim any interest on the amount. It appears that there was again further correspondence exchanged between the parties.

3. Thereafter, the company petition was filed. It came up before the learned single Judge of this court for acceptance. On 9-1-2002, the learned single Judge after going through the petition found that the liability is not admitted. He noted that the company

in its reply to the statutory has given details as to why the claim is denied. It was observed that the Petitioner, therefore, has to establish his claim by filing a suit, and therefore, the petition was not accepted. The present Appeal is directed against that order.

4. At the hearing of the Appeal, we pointed out to the learned Counsel appearing for the Appellant that whether to admit a company petition for winding up or not is in the discretion of the learned single Judge. The learned single Judge, on finding that the explanation given by the company in reply to the statutory notice is acceptable and that the company has disclosed good defence, declined to admit the petition because the learned single Judge found that in this situation as the claim is denied for good reasons, the civil suit is the appropriate remedy. We also pointed out that though the learned single Judge had observed in the order dated 9-1-2002 that as the claim is disputed claim, civil suit is the appropriate remedy and not a company petition, the Appellant has not filed a civil suit for recovery of his claim, with the result now the claim is also barred by the law of limitation, and therefore, it

would not be proper for the Appeal court to interfere with the order passed by the learned single Judge. The learned counsel relied on a judgment of the Division Bench of this Court in the case of Modern Dekor Painting Contracts Pvt.Ltd. v/s. Jenson and Nicholson (India) Ltd., 1985(58) Company Cases, 255 to contend that if the debt is within limitation or is a live debt on the date on which the company petition is filed, then the court cannot decline to make an order for winding up of the company only because on the date when the court is hearing the petition finally the debt has become time barred. Therefore, according to the learned Counsel the Appeal cannot be dismissed by this court on the ground that by now the debt, on which the company petition is based, is barred by the law of limitation.

5. The Supreme Court in its judgment in the case of Amalgamated Commercial Traders (P) Ltd. v/s. A.C.K.Krishnaswami and another, 1965 (XXXV) Company Cases,456 has observed that "It is well-settled that a winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company." It is, thus, clear

that when a debt is disputed by the company and dispute is bonafide, a company petition cannot be entertained. It is also a settled law that Section 433 of the Companies Act does not confer on any person a right to seek an order that a company shall be wound up. It confers power on the court to pass an order of winding up in appropriate cases. It is also well settled that the jurisdiction conferred on the Court by Section 433 is a discretionary jurisdiction. In the present case, perusal of the order impugned in the petition shows that the learned single Judge had gone through the reply which was given to the statutory notice. Perusal of that reply shows that the company was denying its liability to pay any amount on account of conveyance because daily activity reports were not submitted by the Appellant. The company amongst other things also declined to pay any interest because there was no contract for payment of interest. It is now settled law that if there is no written contract between the parties for payment of interest, even a summary suit cannot be entertained by the court. The proceedings under Section 433 in a company petition are summary proceedings. Therefore, it will not be wrong to say that in a company petition the court can deal with

debts which are either admitted or which can be established in a summary proceedings. If one of the claims of the Appellant for interest was incapable of being tried in a summary jurisdiction, then in our opinion, the learned single Judge was perfectly justified in holding that for the claims made by the Appellant the company petition cannot be entertained and the suit is an appropriate remedy. We have noted above that an order admitting the company petition and an order declining to admit the company petition is necessarily an order made in exercise of discretion by the learned single Judge. The Appellate court will not be justified in interfering with that order, unless there are compelling reasons to do so and for that purpose the Appellate Court will be justified, in our opinion, in looking into the conduct of the Appellant also. The learned single Judge had clearly made an order that the company petition is not the appropriate remedy and that the appropriate remedy is a civil suit. Still the Appellant did not file a civil suit for recovery of his claim and allowed that claim to be barred by the law of limitation. The judgment of the Division Bench which has been relied on by the learned single Judge lays down that if there are no other grounds,

then the company Judge cannot decline to make an order for winding up merely on the ground that the debt is barred by the law of limitation. The relevant observations read thus:-

> "While agreeing with the ultimate conclusions of the learned judge, we are not able to subscribe to the said view of the learned Judge. In our view, although under s.433(f) of the Companies Act, the court had a discretion to pass an order of winding up on just and equitable grounds, the other grounds not existing, the court was not entitled in making an order under that clause to take into consideration as one of the circumstances the fact that the debt was barred by limitation at the date of order, or that the creditor had not preserved his claim against the bar of limitation by filing a suit, if in law, the petitioner was not required to do so."

6. From the above observations it follows that apart from the debt being barred by the law of limitation on the date of making of winding up order, if there are other reasons also for declining to make that

order, the court in its discretion can decline to make an order of winding up. The Division Bench in its judgment referred to above was considering the case at the stage of final hearing of the company petition for winding up. It means that in that petition at the admission stage, the court on finding that prima facie the company petition can be entertained, had admitted the petition for final hearing, the company petition was advertised and at that stage the court said that the court cannot refuse to make an order for winding up of the company only on the ground that the debt is barred by the law of limitation. In so far as the present case is concerned, we are considering the matter at the stage of admission of the company petition and at this stage we find that the decision of the learned single Judge that the company has shown good defence is good defence is well founded and in addition the Appellant has also allowed his debt to be barred by the law of limitation, and therefore, in our opinion, we will not be justified in interfering with the order passed by the learned single Judge, which is impugned in this Appeal. Appeal is, therefore, disposed of.

(D.K.DESHMUKH,J.)

(J.H.BHATIA, J.)